

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2008-196-E - ORDER NO. 2009-218

APRIL 21, 2009

IN RE: Combined Application of South Carolina)	ORDER DENYING
Electric & Gas Company for a Certificate of)	PETITIONS
Environmental Compatibility and Public)	
Convenience and Necessity and for a Base)	
Load Review Order for the Construction and)	
Operation of a Nuclear Facility in)	
Jenkinsville, South Carolina		

I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina ("Commission") on Petitions for Rehearing and/or Reconsideration of Commission Order Nos. 2009-104 and 2009-104(A)¹ related to the Base Load Review Application submitted by South Carolina Electric & Gas Company ("SCE&G" or "the Company"), which were filed by Friends of the Earth ("FOE"), the South Carolina Energy Users Committee ("SCEUC"), and Mr. Joseph Wojcicki ("Mr. Wojcicki "). The Petitions are denied, for the reasons stated below.

II. FOE PETITION

With regard to the FOE Petition, the allegations of error are generic for the most part, simply stating that this Commission erred in approving the SCE&G Base Load Review Act Application where there was an alleged failure of the Company to meet its burden of proof under the provisions of the Utility Facility Siting and Environmental

¹ This Commission initially issued its final order, Order No. 2009-104, in this Docket on February 27, 2009. On March 2, 2009, the Commission issued Order No. 2009-104(A) which corrected certain typographical or scrivener's errors.

Protection Act, S.C. Code Ann. Section 58-33-10, *et. seq.* (“the Siting Act”), and the Base Load Review Act, S.C. Code Ann. Section 58-33-210, *et. seq.* (“the Base Load Review Act”). In general, we reaffirm the explanations and reasoning found in Order No. 2009-104(A) in response to these allegations, since we thoroughly explained our findings on most of the points raised by FOE. However, we believe that various paragraphs in the FOE Petition merit individual explanation.

1. Due Process

In Paragraph 1 of the FOE Petition, FOE alleges that the Base Load Review Act on its face and as applied in the Order deprives FOE and all other taxpayers of their property without due process of law in violation of the United States and South Carolina Constitutions. FOE raises this issue for the first time in its petition. There is nothing in the record indicating that FOE has raised the issue of the constitutionality of the Base Load Review Act for a decision by this Commission before Order No. 2009-104 was issued. No written motions raising constitutional challenges to the Base Load Review Act were filed on behalf of FOE before the hearing and no oral motions were made during the hearing to this effect. No testimony was elicited during the hearing regarding this issue.

It is axiomatic that “[a] party cannot raise issues in a Motion to Reconsider that were not raised during the proceeding.” In Re Carolina Water Service, Inc., Docket No. 2006-92-WS, Order No. 2007-140, at 17 (South Carolina Public Service Commission November 19, 2007); see also Kiawah Property Owners Group v. Public Service Commission, 359 S.C. 105, 597 S.E. 2d 145 (2004) (“Since KPOG first broached the

transfer line issue in its petition for rehearing to the PSC, the issue is not preserved.”); South Carolina Coastal Conservation League v. DHEC, 380 S.C. 349, 380, 669 S.E.2d 899, 915 (Ct. App. 2008) (“A party cannot use a Rule 59(e) motion to present an issue to the court that could have been raised prior to judgment but was not so raised.”); McMillan v. S.C. Dep’t of Agric., 364 S.C. 60, 67, 611 S.E.2d 323, 327 (Ct. App. 2005) (issue not preserved “because it cannot be raised for the first time in a motion to alter or amend.”).

Second, the purpose of a petition for rehearing and reconsideration is to allow the Commission to identify and correct specific errors and omissions in its orders. Conclusory statements that amount to general and non-specific allegations of error do not satisfy the requirements of the rule. Under the operative Commission regulation, S.C. Code Ann. Regs. § 103-825(4):

A Petition for Rehearing or Reconsideration shall set forth clearly and concisely:

- (a) The factual and legal issues forming the basis for the petition;
- (b) The alleged error or errors in the Commission order;
- (c) The statutory provision or other authority upon which the petition is based.

As a matter of law, conclusory statements are insufficient to support a petition for rehearing or reconsideration. See Public Service Commission of South Carolina, Order No. 2003-641, at 6 (“a conclusory statement based upon speculation and conjecture is no evidence at all and is legally insufficient to support [a petition for reconsideration]”); see also Camp v. Camp, 378 S.C. 237, 662 S.E.2d 458 (Ct. App. 2008) (motion to reconsider,

alter, or amend judgment under [SCRCP] Rule 59(e) is insufficient where it does not state the grounds with particularity).

FOE has failed to adequately state its grounds for alleging that the Base Load Review Act is unconstitutional on its face or as applied. A general, non-specific and conclusory statement as to the alleged unconstitutionality of the Base Load Review Act on “due process” grounds is insufficient to put the Commission and parties on notice of any specific alleged constitutional defect in the Act and the Order. Such general and conclusory allegations do not provide a sufficient opportunity for the Commission to identify a specific problem with the application of the Act or the Order and address it on rehearing. See e.g., South Carolina Dept. of Social Services v. Mother ex rel. Minor Child, 375 S.C. 276, 283, 651 S.E.2d 622, 626 (Ct. App. 2007) (finding claim of violation of due process abandoned where party made a conclusory argument without citation of any authority to support her claim); see also R & G Const., Inc. v. Lowcountry Regional Transp. Authority, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (“An issue is deemed abandoned if the argument in the brief is only conclusory.”). The allegation of error must be rejected.

2. Permission for Initial Clearing and Construction

In Paragraph 2 of its Petition, FOE alleges that the Commission erred in approving the Combined Application because SCE&G “has failed to establish that: public convenience and necessity justify permission to proceed with initial clearing, excavation, dredging and construction in contravention of S.C. Code Ann. § 58-33-110(7).” FOE Petition, ¶ 2.

The record fully supported the Commission's decision in October of 2008 to allow SCE&G to proceed with initial construction. The hearing on SCE&G's request for permission to undertake initial construction took place on September 10, 2008. SCE&G presented testimony of three witnesses establishing that public convenience and necessity supported its requests. These witnesses testified convincingly as to the public convenience and necessity of starting initial construction at SCE&G's sole risk pending a decision on the merits in this matter. All requirements for granting the requested relief were addressed in that testimony. There is more than adequate evidence supporting the Commission's decision in Order No. 2008-673. The Commission findings in Order No. 2008-673 are reaffirmed. The request for reconsideration in Paragraph 2 of FOE's Petition must be denied.

3. Description of the Facility

In Paragraph 3 of its petition, FOE alleges that the Commission erred in approving the Combined Application because SCE&G has failed to fully and accurately describe and establish a description of the facility to be built, the environmental impacts of the facility, the need for the facility, and other relevant information in contravention of S.C. Code Ann. § 58-33-120. There are multiple grounds that require denial of reconsideration.

First, the allegations of Paragraph 3 fail to satisfy the requirements of the Commission's Regulations regarding the content of a petition for rehearing or reconsideration and must, therefore, be denied. S.C. Code Ann. Regs. 103-825(4). FOE does not point the Commission to any specific defect of law or specific inadequacy in the

factual record in this case making any decisions as to the sufficiency of the description of the facility, its environmental effects or any other relevant matter defective. FOE's allegations provide no basis for the Commission to determine which specific legal conclusions or factual findings contained in the Order are improper and should be reconsidered. Such conclusory allegations fail to comply with the requirements of S.C. Code Ann. Regs. § 103-825(4). Therefore, the relief sought in Paragraph 3 must be denied. See Camp v. Camp, 378 S.C. 237, 662 S.E.2d 48 (Ct. App. 2008).

Second, S.C. Code Ann. § 58-33-120 deals only with the required content of a Siting Act application. That application was filed with the Commission on May 30, 2008, over nine months ago. FOE did not move to strike the application nor has it properly raised any objection to the sufficiency of the application in this matter prior to the Order being issued. To the extent that FOE is challenging the sufficiency of SCE&G's application under the Siting Act, such a challenge is untimely and not properly before the Commission in a Motion for Rehearing or Reconsideration.

Third, and contrary to the allegations of FOE, the descriptions of the facility contained in the record are more than adequate to met the provisions of S.C. Code Ann. § 58-33-120. Those descriptions are supported by ample evidence in the record.

The record shows that SCE&G fully and accurately described the facility to be built, both in the Combined Application it filed on May 30, 2008 and in the extensive testimony in the record on this point. Company witnesses Marsh, Byrne, Connor and Summer, and ORS witnesses Crisp and Evans testified at length in the hearing on this matter describing the technology, processes, configuration, capacity and location of units to be built. Their

testimony describing the units was full and accurate and was subject to extensive cross examination at the hearing in this matter.

FOE also contends that the Commission erred on the basis that SCE&G “failed to fully and accurately describe and establish a description of . . . the environmental impact of the facility.” The Order directly contradicts this contention. Company witnesses Steven Connor and Stephen Summer testified concerning the most recent environmental report and its conclusions. That report is over 1,100 pages long and represents the work of over 25 major contributors and over 25,000 hours of work by environmental experts and others. The report examined a comprehensive list of possible environmental impacts of the plant and provided a detailed analysis of Site and Vicinity Land Use; Air Quality; Water Quality; Water Quantity and Use; Terrestrial Ecosystems; Aquatic Ecosystems; Threatened and Endangered Species; Historic and Cultural Resources; and Transportation. The report specifically examined the likely radiological impacts of the plant and the provisions for the storage and disposal of low-level wastes and spent fuel assemblies. The report concluded that the impact of the plant on each of the areas enumerated above would be "small," which is defined as environmental effects which are not detectable or are so minor that they will neither destabilize nor noticeably alter any important attribute of the resource. The only exception was in the area of transportation. The report concluded that the effect of the Units on traffic patterns in the vicinity of the Units would be small to large, with the greatest impact due to the increased road use in the area caused by construction traffic but would be moderate during the operation of the facility.

ORS Witness Crisp testified concerning ORS's review and audit of this environmental information. ORS witness Crisp testified that SCE&G had fulfilled its obligation for filing its environmental report with the NRC and had established a protocol to address the necessary permitting from state and federal agencies to protect the South Carolina environment, and he supported the conclusion that the environmental effects of the plant would be as set forth in that report. Order No. 2009-104(A) at 29-30 (citations omitted). In addition, the Commission considered evidence regarding the long-term disposal of spent fuel (Order at pp. 30-32), radioactive solid waste (Order at p. 32), and the availability of disposal sites (Order at pp. 32-33). The Order and the Record directly contradict the assertions of FOE on this issue.

FOE also contends that the Commission erred in issuing the Order because SCE&G “failed to fully and accurately describe and establish a description of . . . the need for the facility.” However, as the Order states:

As the testimony of record indicates, base load capacity is fuel efficient generating capacity intended to run for thousands of hours a year and at high capacity factors. Such plants are the foundation upon which an electric system operates and on which it relies for the majority of the energy used to serve customers. Peaking and intermediate units are intended to run for substantially fewer hours per year.

Order No. 2009-104(A), pp. 25-26 (citations omitted). As Mr. Marsh testified, SCE&G last added a base load resource to its electric system when Cope Station went into commercial operation in 1996. Since that time, energy use on SCE&G's system has grown by 31%. By 2016, energy use on SCE&G's system is forecasted to have grown by a total of 44%. Current operating statistics demonstrate the importance of base load generation to serving customers' energy needs. During 2007, base load plants constituted

56% of SCE&G's generation capacity. However, they produced over 80% of the energy used by SCE&G's customers during that year. Base load capacity-which represented 75% of SCE&G's generating capacity in 1996-is forecasted to drop to 45% as a share of total generation capacity by 2020 unless new base load resources are added in the interim. Order No. 2009-104(A), pp. 25-27 (citations omitted).

Based on the stated information, the Commission finds that the record supports the Company's testimony that the specific capacity need for 2016 and 2019 is most reliably and efficiently met through the addition of new base load capacity to its system. Units 2 and 3 represent such capacity.

As the foregoing shows, the Commission's decision and Order concerning the description of the facility to be built, the environmental impacts of the facility, the need for the facility, and other relevant information was supported by ample evidence in the record which the Commission weighed and considered. For this reason, the relief sought in Paragraph 3 of the FOE Petition must be denied.

4. Need, Environmental Impacts and Compliance, Economy and Reliability, Convenience and Necessity

Paragraph 4 of FOE's Petition alleges that the Commission erred in approving the Combined Application because SCE&G failed to satisfy the six requirements of S.C. Code Ann. § 58-33-160 which it repeats from the statute without elaboration. Again, FOE's contentions are wholly conclusory. The petition does not "clearly and concisely" set forth any specific factual or legal basis for the contention that the requirements of § 58-33-160 have not be met. The Commission is left to guess as to which specific

findings or rulings made in the Order were incorrect or in what way they were legally or factually deficient. As a matter of law, such conclusory statements are insufficient to support a petition for rehearing or reconsideration. See Order No. 2003-641, at 6 (“As a matter of law, however, a conclusory statement based upon speculation and conjecture is no evidence at all and is legally insufficient to support [a petition for reconsideration]”); see also Camp, 378 S.C. 237, 662 S.E.2d 458 (motion to reconsider, alter, or amend judgment under [SCRCP] Rule 59(e) is insufficient where it does not state the grounds with particularity).

The conclusory allegations contained in Paragraph 4 of FOE’s Petition fail to comply with the requirements of S.C. Code Ann. Regs. § 103-825(4). For this reason, the relief sought in Paragraph 4 must be denied.

In addition, with regard to the specifics of FOE’s allegation of error, the Order clearly shows that the Commission’s decisions in the Order were supported by ample evidence in the record.

(a) Environmental Impacts

In addition to the matters discussed above in response to Paragraph 3, the Commission’s Order made the following determinations regarding the justification of the environmental impacts of the facility:

The environmental report concluded that wind, solar, biomass and hydro generation were not feasible alternatives to nuclear or fossil fired generation. As to solar and wind generation, the environmental report concluded that these energy sources would have greater environmental impacts than nuclear given the amount of area that would need to be dedicated to them and the new transmission facilities they would require. For purposes of the environmental assessment, coal and gas generation were identified as the principal alternatives to nuclear generation. Both

coal and gas alternatives were found to have significantly greater environmental impacts than Units 2 and 3, due principally to significantly higher air emissions, specifically the amount of additional CO₂, nitrous oxides, SO₂ and particulates that would be emitted by either gas or coal generation. The environmental report concluded that from an environmental standpoint, nuclear generation was the best alternative for meeting the energy needs of SCE&G's customers with the least impacts on the environment. The Commission finds that this conclusion is amply supported on the record.

Order No. 2009-104(A), pp. 33-34 (citations omitted).

(b) Economy and Reliability, Convenience and Necessity

Regarding system economy and reliability, the Commission discussed, in detail, such factors as alternative energy resources, the cost of constructing the nuclear facility, the terms of the EPC contract, cost contingencies, inflation, delay, the ability of the facility to meet projected capacity, water supply, and transmission from the proposed location. See Order No. 2009-104(A), pp. 34-55. Based on these factors, and detailed evidence in the record, the Commission concluded:

For all these reasons, the Commission finds that the cost projections and comparative economic analyses on which the selection of Units 2 and 3 was made are reasonable and appropriate. Based on these specific economic analyses and the broader evaluation of system needs by SCE&G's leadership team, the Company properly concluded that the construction of Units 2 and 3 would provide the greatest and most dependable contribution to system economy of all reasonably competitive alternatives.

Order No. 2009-104(A), pp. 51-52.

The Commission further concluded, “[a]s witnesses for both the Company and ORS testified, the water supplies available at the site of Units 2 and 3 are more than adequate to support reliable operations of Units 2 and 3.”

Id. at 54.

(c) Environmental and Other Compliance

As to the reasonable assurances that the proposed facility will conform to applicable State and local laws and regulations, the Order discussed the detailed evidence presented in the record concerning the permits needed to proceed with the construction and operation of the nuclear facility and SCE&G's ability to obtain them. As stated in the Order:

The fifth finding required by the Siting Act is whether "there is reasonable assurance that the proposed facility will conform to applicable state and local laws and regulations." Hearing Exhibit 2 contains a list of the 19 major permits, apart from NRC permits, required to construct and operate Units 2 and 3. Three of the 19 major permits are federal permits exclusively: a Federal Energy Regulatory Commission permit for work on Monticello Reservoir, a Corps of Engineers wetlands permit for site work, and a Federal Aviation Commission permit for construction cranes to be erected on site. The remaining 16 permits are state permits or joint state-federal permits administered by the state. The record reflects that, so long as SCE&G obtains these 16 permits and operates according to their terms, the construction and operations of Units 2 and 3 will be in compliance with all state and local laws.

Company witness Byrne testified that in his opinion and in the opinion of the members of his new nuclear deployment team, all of these permits could be obtained in a timely fashion and that Units 2 and 3 could be operated in compliance with all applicable laws and regulations, both state and federal. Mr. Byrne's testimony on this point was not contradicted by any party. Accordingly, the record supports the finding that Units 2 and 3 can be built and operated in compliance with all applicable state and local laws and regulations as the Siting Act requires.

Order No. 2009-104(A) at 55-56 (citations omitted).

(d) Public Convenience and Necessity

Finally, the Commission made the following determination regarding the issue of public convenience and necessity:

The Commission construes this provision of the statute as requiring a finding that integrates into a single determination all aspects of the public interest evaluation related to the plant. In this case, the record demonstrates that Units 2 and 3 represent capacity that is needed to supply reasonably forecasted customer demands. In addition, the size, type, location and technology of the Units are the preferable means of doing so with the greatest economy and reliability and with the least impact on the environment.

As discussed above, the principal benefit of nuclear generation, in addition to lower forecasted costs, is the fact that it helps insulate customers from the price volatility and supply risk that are increasingly associated with fossil fuel fired generation. Nuclear generation also insulates customers from future CO₂ and other environmental compliance costs associated with fossil fuels, which are likely to be significant. Alternative energy sources may provide useful supplemental energy for SCE&G's system going forward. However, the cost competitiveness, availability and reliability of alternative energy sources are subject to significant questions and concerns at this time. Public convenience and necessity would not be supported by forcing SCE&G's customers to rely on the future availability and cost competitiveness of these energy sources as a substitute for SCE&G constructing additional base load capacity at this time.

The risks related to nuclear construction, and the steps that SCE&G has taken to mitigate them, are discussed extensively in the record. The Company's plans to manage licensing risks and delays and to oversee construction through its own personnel and processes are also discussed more fully below. The record shows that the Company has carefully evaluated the risks related to nuclear construction and operations and compared them to the risks and costs of other alternatives. The Commission agrees with this assessment and finds that the public convenience and necessity support the construction of Units 2 and 3 as proposed by SCE&G.

Order No. 2009-104(A) at 56-57.

(e) Conclusion

As the foregoing shows, the Commission's decision and Order on SCE&G's Combined Application was carefully considered and supported by ample evidence in the record. FOE has not pointed to any specific factual or legal insufficiency in the findings

set forth above. For all the above reasons, the relief sought in Paragraph 4 must be denied.

5. Imprudent Obligations or Costs

Paragraph 5 of the Petition cites to the Purposes and Findings adopted by the General Assembly in enacting the Base Load Review Act, 2007 Act. No. 16, Section 1(A), and alleges that the Commission erred in some respect regarding the protection of consumers from responsibility for imprudent obligations or costs. The language FOE quotes is a legislative statement of intent that was not codified in the Base Load Review statutory provisions, and which is not operative in its own right but is given substance by the specific statutory requirements found in the Code. Bayle v. South Carolina Dept. of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct. App. 2001) (“What a legislature says in the text of a statute is considered the best evidence of legislative intent or will.”).

As legislative findings, these policy statements do not constitute a legal basis or standard against which to review the material presented by SCE&G in this docket separate from the substantive provision of the Act. In fact, as discussed herein, the Commission has reviewed the application and the substantial evidence compiled in this docket against the substantive requirements of the Act and has found that SCE&G has demonstrated that the financial obligations and costs that it seeks to undertake are prudent and reasonable. The intent of the General Assembly is found in the substantive terms of the statute, and the Commission has properly found that SCE&G’s application in this matter has met those terms.

Moreover, once again, FOE does not provide the Commission with any guidance to show what specific findings or conclusions in the Order are factually or legally defective. In Order 2008-104, the Commission clearly determined that the cost and obligations SCE&G proposed to assume in constructing these units were not imprudent. FOE has not pointed to any specific legal or factual reason why this decision is defective. For that reason, FOE has failed meet the requirements of S.C. Code Ann. Regs. § 103-825(4) and the relief sought in Paragraph 5 of the Petition must be denied. See also Camp, 378 S.C. 237, 662 S.E.2d 458 (motion to reconsider, alter, or amend judgment under [SCRCP] Rule 59(e) is insufficient where it does not state the grounds with particularity).

6. Prudency of the Units

In Paragraph 6, FOE alleges in summary and conclusory fashion that SCE&G has in some unspecified manner failed to meet its burden of proof as it relates to the Combined Application and the prudency of the decision to build the plant. Again this set of contentions is entirely conclusory and fails to meet the requirements of S.C. Code Ann. Regs. § 103-825(4) as a basis for a motion for rehearing or reconsideration. See also Camp, 378 S.C. 237, 662 S.E.2d 458 (motion to reconsider, alter, or amend judgment under [SCRCP] Rule 59(e) is insufficient where it does not state the grounds with particularity).

In addition, the allegations in Paragraph 6 are plainly contradicted by the Commission's Order and the record in this proceeding. In discussing the prudency requirement of the Base Load Review Act, the Commission noted multiple factors

showing that the Company's decision to proceed with construction of the facility was prudent and reasonable. These factors included: a) the selection of the Jenkinsville site for Units 2 and 3; b) the selection of AP 1000 technology as the appropriate reactor technology for this project; c) the related decision to select Westinghouse Electric Corporation, LLC and Stone & Webster, Inc. as the nuclear system supplier and construction contractor, respectively; d) the selection of other major contractors for the project; e) the structure and terms of the EPC Contract; f) the price at which the plant is being constructed; and g) the Company's ability to execute its financing plan for construction of the Units. Order No. 2009-104(A), p. 58. The Commission analyzed the record regarding each of these factors in detail and concluded with respect to each that they supported the reasonableness and prudence of the SCE&G's decision. *See generally* Order No. 2009-104(A) at 57-91.

As the foregoing shows, the Commission's decision and Order as to prudence was carefully considered and supported by ample evidence in the record. No specific legal or factual error has been identified. For these reasons, the relief sought in Paragraph 6 must be denied.

7. S.C. Code Ann. § 53-33-250

In Paragraph 7 of the Petition, FOE alleges, again in a summary and conclusory fashion, that the Commission erred in approving the Combined Application because SCE&G failed to satisfy in some undisclosed respect each of the specific requirements of S.C. Code Ann. § 58-33-250. Once again, the Commission is left to guess in what manner FOE believes SCE&G legally or factually failed to meet its statutory burden and

what specific findings and conclusions in the Order would need to be corrected. As this allegation fails to comply with the requirements of S.C. Code Ann. Regs. § 103-825(4), the relief sought in Paragraph 7 of FOE's Petition must be denied. See also Camp, 378 S.C. 237, 662 S.E.2d 458 (motion to reconsider, alter, or amend judgment under [SCRCP] Rule 59(e) is insufficient where it does not state the grounds with particularity).

In addition, FOE's allegations in Paragraph 7 appear to pertain to matters required to be included within an application for a base load review order under the Base Load Review Act. To the extent that FOE is challenging the sufficiency of SCE&G's application under the Base Load Review Act, and for the same reasons set forth related to the Siting Act discussion in Paragraph 3 above, no such a challenge has been properly raised and is untimely.

8. Decision to Proceed with Construction

In Paragraph 8 of its petition, FOE alleges again that SCE&G has failed in some unspecified manner to demonstrate that its decision to proceed with construction of the plant is prudent and reasonable. Once again, this entirely conclusory allegation fails to comply with the requirements of S.C. Code Ann. Regs. § 103-825(4) and the relief sought in Paragraph 8 of FOE's Petition must be denied. See also Camp, 378 S.C. 237, 662 S.E.2d 458 (motion to reconsider, alter, or amend judgment under [SCRCP] Rule 59(e) is insufficient where it does not state the grounds with particularity). Moreover, as discussed in response to Paragraph 6, the Commission's decision and Order regarding the prudence of SCE&G's decision to undertake construction of these Units was carefully

considered and supported by ample evidence in the record. For these reasons, the relief sought in Paragraph 8 must be denied.

9. Used and Useful, Prudence of Costs

In Paragraph 9 of its Petition, FOE alleges that SCE&G has not demonstrated that the proposed plant will be used and useful for utility purposes or that its costs will be prudent utility costs and expenses when the units are constructed. Once again, the allegations are entirely conclusory. FOE fails to allege and specify the way in which the Order misconstrues the applicable law or rests on factual findings that are not supported by the evidence of record. For these reasons, the allegations of Paragraph 9 fail to comply with the requirements of S.C. Code Ann. Regs. § 103-825(4) and the relief sought in Paragraph 9 of FOE's Petition must be denied. See also Camp, 378 S.C. 237, 662 S.E.2d 458 (motion to reconsider, alter, or amend judgment under [SCRCF] Rule 59(e) is insufficient where it does not state the grounds with particularity). For these reasons, the relief sought in Paragraph 9 must be denied.

Current Economic Conditions

In Paragraph 10 of the Petition, FOE alleges that SCE&G has not adequately analyzed its options, its forecast needs and resources, and the impacts of recent developments in the economy and financial markets or the current economic crisis. Contrary to this allegation, the Commission, in its Order, specifically recognized that SCE&G has considered these factors in making its determination to proceed with construction of the facilities. Order No. 2009-104(A) at 23-24. Moreover, the Commission found that SCE&G had also considered the historical effects of economic

downturns on load growth. Id. Finally, the Commission recognized the benefit of not basing the State's long-term energy supply strategy on short-term economic conditions.

Order No. 2009-104(A) at 24. As stated by the Commission:

While the current economic downturn is a matter of concern to all South Carolinians, it is important that long-term infrastructure projects needed to meet the state's future energy demands not be shelved too quickly. To prosper and compete in global markets in the future, South Carolina will need efficient, reliable energy sources. The generation capacity SCE&G now seeks to build will take 12 years to complete and will serve the state for as many as 60 years thereafter. The Commission agrees with Company witness Addison who testified that long-term decisions related to energy capacity should be based on the long-range needs of the system and the state economy, not shorter-term considerations.

Id.

For these reasons, FOE's allegations in Paragraph 10 are without merit and the relief sought in Paragraph 10 should be denied.

10. Energy Efficiency and Related Matters

In Paragraph 11, FOE contends that SCE&G could lower its risk profile if it pursued a more modular resource development program and that the Commission should reject the Application or at least defer it to allow SCE&G to better develop its integrated resource plan and complete its review of energy efficiency and demand side management opportunities. The Commission has fully and adequately considered this recommendation as advanced by FOE Witness Ms. Brockway, and has found it to be contrary to the terms of the Base Load Review Act. As stated by the Commission:

As to the second recommendation, the Company properly points out that the Base Load Review Act mandates a final determination and order on the part of the Commission within nine months of the filing of the application and that the Act does not provide a means whereby the Commission can defer judgment on an application. Counsel for FOE

argues that the Commission is authorized to reject an application as inadequate in certain respects and to send it back to the utility with a statement of its inadequacies. However, the Commission finds that the Act does not allow this Commission to defer judgment on an application as Ms. Brockway suggests.

Order No. 2009-104(A) at 115 (citations omitted).

In addition, the Commission has considered the impact that additional energy efficiency and demand side management opportunities would have and concluded that they are inadequate substitutes for additional base load capacity.

Based on the evidence cited above, the Commission finds that additional savings due to DSM programs are not a viable substitute for the base load capacity that SCE&G seeks to build. Contrary to the testimony of FOE witness Brockway, who opined that the Company had failed to adequately consider DSM in its planning, the Commission finds Dr. Lynch's forecasts and analyses have properly accounted for or analyzed the potential for additional DSM-related savings. Moreover, SCE&G's resource plans contain room for additional DSM related energy savings even with the addition of Unit 2 and 3 to the system. DSM is a useful supplement to the generation capacity needed on SCE&G's system. It is not a substitution for it.

Order No. 2009-104(A) at 20 (citations omitted).

FOE offers no basis for rejecting the sound reasoning of this Commission in its Order and, for these reasons, the relief sought in Paragraph 11 must be denied.

11. Conditioning BLRA Cost Recovery

In Paragraph 12 of the Petition, FOE proposes conditioning SCE&G's recovery of costs on achieving the benefits implicit in its analysis of the merits of the proposal. Contrary to FOE's assertion that such a condition is entirely consistent with the Base Load Review Act, this Commission has thoroughly considered this recommendation and has found it be contrary to the terms of the Act.

In addition, Company counsel also cites Section 58-33-270(B) that provides that a Base Load Review order shall establish the anticipated construction schedule for the plant, including contingencies; the capital costs and anticipated schedule for incurring them, including contingencies and inflation indices used for the utility for cost in plant construction. The Base Load Review Act clearly contemplates a utility's ability to include contingencies in its schedule, recover capital costs related to the project, and seek modification of a Base Load Review Order, subject to approval by the Commission. Order No. 2009-104(A) at 114. FOE offers no basis for rejecting the reasoning of the Commission in its Order and, for this reason, the relief sought in Paragraph 12 should be denied. The Commission's reasoning is in full compliance with the Base Load Review Act, and the allegation must be rejected.

12. General Allegations of Error

In Paragraph 13 of the Petition, FOE alleges that that Commission's Order is arbitrary, capricious, an abuse of discretion, clearly erroneous, unsupported by substantial evidence, in violation of constitutional or statutory provisions, made upon unlawful procedure or affected by other error of law. This paragraph simply restates the grounds for appeal under the S.C. Administrative Procedures Act, S.C. Code Ann. § 1-23-380 (2005). This paragraph is entirely conclusory and lacks sufficient particularity to comply with the requirements of S.C. Code Ann. Regs. § 103-825(4). Moreover, as discussed in the response to Paragraph 1, no claim of unconstitutionality as to the Base Load Review Act or the procedures it mandates has been made in this proceeding. FOE cannot insert new issues into the docket in its Petition for Rehearing or Reconsideration. Finally, it is

unclear what “unlawful procedure” or “other error of law” is being alleged by FOE and these allegations are so vague as to deprive the Commission and SCE&G with sufficient information to respond to them. For all these reasons, the relief sought in Paragraph 13 of the Petition must be denied.

Because of the reasoning stated above, the Petition of Friends of the Earth is denied and dismissed.

III. SCEUC PETITION

In its petition, SCEUC asks the Commission to reconsider certain of its findings and conclusions within the Order in this docket.² These allegations are also rejected, and the Petition is denied and dismissed.

1. Contingency Costs as a Component of SCE&G’s Capital Costs

SCEUC asserts that the Commission erred in including capital cost contingencies as a component of capital costs. Contrary to the assertions of SCEUC, the Commission has fully considered the propriety of the inclusion of such costs and has concluded they are properly included and authorized by the Base Load Review Act.

SCEUC asserts that the Commission “overlooked and misapprehended the nature of the authority granted it by statute to establish the anticipated components of capital costs under the Base Load Review Act.” SCEUC Petition at p. 2. Contrary to this assertion, the Order evidences the fact that this Commission considered the statutory

² We note that SCEUC misquotes part of Order No. 2009-104(A) at page 97, when it states: “the Commission reads the statute as authorizing the Company to include a reasonable capital cost contingency in its filings, for evaluation and approval by this Commission. There is no logical or policy reason to read the statute.” (emphasis added). It appears SCEUC inadvertently left out the word “otherwise” at the end of the last quoted sentence. The sentence in the Order actually reads: “There is no logical or policy reason to read the statute otherwise.” (emphasis added). *Id.*

authority under the Act and correctly concluded that such costs were authorized. In the Order, this Commission stated that “[a]n important part of evaluating the reasonableness of the Company’s price projection for the Units is evaluating the degree to which they include reasonable provisions for the contingencies and inflation over the construction, as the Base Load Review Act envision.” Order No. 2009-104(A) at 47. In concluding that a contingency pool of \$438,293,000.00 was reasonable and should be established, the Commission further found that:

This amount of contingency is reasonable in light of what is known about the project and its risks today. It provides further assurance that the Company's price projections do not underestimate the cost of nuclear capacity and so provide a reasonable basis for comparing nuclear capacity to other alternatives.

Id., p. 47-48. Finally, as stated in the Order:

The Commission has reviewed these contingencies and finds that they represent a reasonable set of contingencies for use in forecasting the cost of this project under S.C. Code Ann. § 58-33-270(B)(2). The contingency percentage applied to each cost category bears a reasonable relationship to the risk of additional costs being incurred in that category. In total, the contingency pool included on Exhibit F represents a significant but not excessive percentage of the total project budget. The Commission finds that it is reasonable and prudent to include the contingencies proposed by the Company in the cost estimates for Units 2 and 3 as approved in this order.

Id., p. 96.

SCEUC also misconstrues § 58-33-270 of the Base Load Review Act in its argument that capital costs contingencies are not authorized under the Act. SCEUC argues that the phrase "including specified contingencies" as used in § 58-33-270(B)(2) “modifies the term ‘anticipated schedule for incurring [anticipated components of capital costs]’ and cannot be read to authorize the Commission to include a capital cost

contingency as a component of capital costs.” SCEUC Petition, p.4. This interpretation is in direct conflict with the terms of § 58-33-275. Under this section:

(A) A base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes, and that its capital costs are prudent utility costs and expenses and are properly included in rates so long as the plant is constructed or is being constructed within the parameters of:

1. the approved construction schedule including contingencies;

and
2. *the approved capital costs estimates including specified contingencies.*

S.C. Code Ann. § 58-33-275 (emphasis added). As evidenced by this section, it is clear that the intent of the General Assembly is that cost contingencies are properly considered as a component of capital costs under the Base Load Review Act. Not only has this Commission considered its statutory authority under the Act but it has expressly considered and rejected the argument that SCEUC raises in its Petition:

In reaching this decision, this Commission has considered two arguments made by the South Carolina Energy Users. The first is the argument that S.C. Code Ann. § 58-33-270(B)(2) does not allow the Commission to establish a construction cost contingency pool. The statutory provision in question requires that the Commission establish "the anticipated components of capital costs and the anticipated schedule for incurring them, including contingencies." The Commission finds that the plain meaning and grammatical structure of this statutory provision intends that contingencies be provided both for capital costs and for the schedule for incurring capital costs. In addition, cost contingencies are a standard and recognized feature of construction budgets. If such contingencies were not allowed under the Act, the Company would be required to seek an amendment to the base load review order for every change order, scope or design change, or mis-forecast of owner's cost or transmission cost during the life of the project. This is not a reasonable reading of the statute. Instead, this Commission reads the statute as authorizing the Company to include a reasonable capital cost contingency in its filings, for evaluation

and approval by this Commission. There is no logical or policy reason to read the statute otherwise.

Order No. 2009-104(A) at 47. In its Petition, SCEUC merely reiterates arguments expressly considered and rejected by the Commission. The Commission finds no basis for granting rehearing or reconsideration on these issues.

In addition, SCEUC argues that the availability of the ability to seek an order modifying a Base Load Review Order supports its contention that the Commission is without authority to address unanticipated contingencies. SCEUC Petition, ¶ 6. As stated in the Order, however:

If such contingencies were not allowed under the Act, the Company would be required to seek an amendment to the base load review order for every change order, scope or design change, or mis-forecast of owner's cost or transmission cost during the life of the project. This is not a reasonable reading of the statute.

Order No. 2009-104(A) at 97. As discussed, the Commission's decision rests upon the plain language of the statute as well as the logic and policy of the Act and the arguments of SCEUC are without merit.

3. Capital Cost Contingencies and Inflation Indices

SCEUC also asserts in its Petition that the Commission erred in authorizing a capital cost contingency in addition to inflation indices. SCEUC Petition, ¶ 3. SCEUC also contends that the inflation indices operate to inflate the unauthorized capital cost contingency and, therefore, that the amounts owing to inflation of the capital cost contingency are unauthorized. SCEUC Petition, ¶ 5. The Commission has considered these arguments and has rejected them.

The second argument made by the Energy Users is that the Company double-counted inflation in calculating the amount of the contingency presented in Exhibit F. The Energy Users did not present any testimony concerning this point from its witness Mr. O'Donnell, but instead attempted to develop this point on cross examination of Ms. Best and Mr. Addison. Both denied any such double counting. Moreover, a review of Exhibit F establishes that the Company in fact allocated contingency amounts by year in 2007 dollars, and then escalated them to current year dollars only once. The Commission finds that the Company did not double escalate any contingency amounts. See Order No. 2009-104(A) at 97-98.

As the Order shows, the Commission has considered SCEUC's argument and has found that the inclusion of contingency costs is authorized under the statute and that the need for such costs is not vitiated by the application of the approved inflation indices. The contingency dollars SCE&G sought were calculated in 2007 dollars. Clearly, contingencies priced in 2007 dollars must be escalated to account for inflation if they are to be sufficient for use in future years, in some cases in as much as 10 years in the future. The approach to contingency escalation approved in Order No. 2009-104(A) is legally sound, logically necessary, and fully authorized by the Base Load Review Act.

4. Reasonableness of Contingency Costs

SCEUC asserts that the Commission erred in finding and concluding that the authorized contingency costs of approximately \$438,293,000.00 was reasonable. The basis for this assertion is that "there exists no reasonable evidence to support the amount

of the contingent costs, fixed adjustment costs and other similar costs.” SCEUC Petition,

¶ 4. The Commission’s Order states:

As to these contingencies, Company witness Addison testified that the capital cost estimates included in the Company's price forecasts include a pool of contingency funds above those already included in the EPC Contract cost and the owner's cost and transmission cost estimates. [cit] The amount of that contingency pool is \$438,293,000 in 2007 dollars, subject to escalation. (Hearing Exhibit 16, EEB-I.) This contingency pool represents approximately 10% of the base cost of the Units. This amount of contingency is reasonable in light of what is known about the project and its risks today. It provides further assurance that the Company's price projections do not underestimate the cost of nuclear capacity and so provide a reasonable basis for comparing nuclear capacity to other alternatives.

Order No. 2009-104(A), at 47-48. The Commission has, therefore, considered the arguments of SCEUC in light of the evidence in the record and has rejected them and concluded that the amount of the contingency costs component is reasonable.

5. Burden of Proof Regarding Capital Costs Contingency

Finally, SCEUC contends that the Commission erred in concluding that the intervenors failed to meet their burden of proof with respect to the capital cost contingency. SCEUC Petition, ¶ 7. SCEUC states that “[t]he intervenors such as SCEUC have no burden of proof of [sic] this issue.” *Id.* Contrary to the contention of SCEUC, this Commission’s Order in no way indicates that the Commission has imposed any burden of proof on the intervenors in this matter. The Order merely indicates that the Commission has considered and rejected the arguments of SCEUC. SCEUC’s contention that the Commission has improperly shifted the burden of proof in this matter is without a factual basis.

For the foregoing reasons, this Commission denies the relief sought by South Carolina Energy Users Committee in its Petition for Reconsideration and denies and dismisses the Petition in its entirety.

IV. JOSEPH WOJCICKI PETITION

The gravamen of the Petition for Rehearing or Reconsideration of Joseph Wojcicki is that SCE&G failed to adequately consider an alternative Atlantic Coast location and that the Commission erred in not requiring additional documentation and consideration of an alternative Atlantic Coast location and its suitability over the selected Jenkinsville site. As noted by the Order, however, the arguments of Mr. Wojcicki have been adequately heard and considered by the Commission and have been rejected as a basis for denying the Combined Application.

Mr. Wojcicki challenged the proposed site of Units 2 and 3 as being unsuitable from a reliability standpoint because of concerns about the sufficiency of water supply for the Units during drought conditions and because of their location in relation to system load centers.

As witnesses for both the Company and ORS testified, the water supplies available at the site of Units 2 and 3 are more than adequate to support reliable operations of Units 2 and 3. Order No. 2009-104(A) at 52-54 (citations omitted).

In addition, the Commission has considered and rejected Mr. Wojcicki's contention that an Atlantic Coast site would be preferable from the standpoint of transmission. Mr. Wojcicki a contended that the location of Units 2 and 3 in Jenkinsville does not support the reliability of the system because of its distance from load centers in

coastal areas of SCE&G's service territory. However, as SCE&G's Manager of Transmission Planning, Company witness Young testified that SCE&G's largest load center is not located along the coast but in the central portion of South Carolina, where Units 2 and 3 will be located. If the units were located at the coast, new transmission lines connecting them to the load center in the central portion of the state would be required. Moreover, currently there are six SCE&G transmission lines and two Santee Cooper lines serving the site of Unit 1 and only four new SCE&G lines and two new Santee Cooper lines will be needed to move the additional power to be generated by Units 2 and 3. A coastal site would not have an existing transmission infrastructure such as the one at the Jenkinsville site and would require a full complement of six to ten new transmission lines to distribute the power generated to different areas of the system.

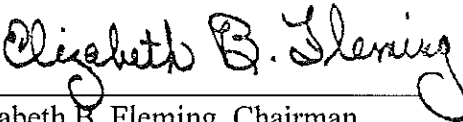
For these reasons, the decision to locate Units 2 and 3 in central South Carolina and not along the coast as advocated by Mr. Wojcicki is prudent and reasonable and does not impair the reliability of those Units to serve customer load from a transmission standpoint. Neither water supply nor transmission issues are likely to compromise the reliability of those units. Mr. Wojcicki's motion to require relocation is again denied. Order No. 2009-104(A) at 54-55 (citations omitted). As the Commission has adequately considered and rejected the contentions of Mr. Wojcicki, his petition for rehearing or reconsideration is denied and dismissed.

V. CONCLUSION

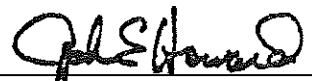
Any remaining allegations of any of the three Petitions not specifically addressed herein are hereby expressly denied and dismissed. The Petitions of FOE, SCEUC, and

Mr. Wojcicki are also hereby denied and dismissed. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:


Elizabeth B. Fleming, Chairman

ATTEST:


John E. Howard, Vice Chairman
(SEAL)